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No. 05-1501

IN THE

Supreme Court of the United States

IN RE: JOHN J. KORESKO, V

JOHN J. KORESKO, V; REGIONAL EMPLOYERS'; ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; AND KORESKO & ASSOCIATES, P.C.,
Petitioners,

v.

ELAINE L .CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETTIONERS SUR REPLY TO BRIEF IN OPPOSITION

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COUNTER STATEMENT

The Department of Labor's (DOL) brief in opposition is a deft attempt to divert this Court from the import of this case. DOL misstates facts, introduces new arguments and wrongfully asserts that the privacy laws, which limit ERISA § 504, were not raised below. DOL ignores critical issues of law and fact. Likewise, DOL ignores the conflict in the Circuits that merits this Court's review.

In Section 1(a) of its brief, DOL admits that a multiple-employer welfare arrangement (MEWA) may not be an ERISA Plan under 29 U.S.C §1002(1), but adds that individual employers in the MEWA may establish ERISA plans. This truism is clearly meant to imply that DOL had authority to issue the challenged subpoenae. This is obfuscation. DOL never subpoenaed an individual employer's plan. It subpoenaed two unincorporated employer associations (DVL and REAL) whose multiple-employer VEBA trusts for over 20 years have admittedly been outside DOL jurisdiction.

Petitioners respectfully direct the Court to their original brief at page 12. For the last 20 years DOL's litigation position has been that multiple employer trusts (MET) like REAL VEBA are not ERISA plans because employers or employees do not control them. DOL has consistently stated that unless the MET is under the control of employers/employees, it is not an ERISA plan and is therefore not subject to DOL review. If the arrangement is not an "employee benefit plan" described in ERISA, DOL has no jurisdiction and no power to employ ERISA § 504 against Petitioners.

Usually an administrative agency seeking judicial enforcement of its subpoena must examine the relevant records

to determine its jurisdiction and coverage of the entity and information sought. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946). However, this matter is not the norm because two federal courts have already determined independently that the plans sponsored by DVL and REAL are not employer/employee controlled.[1] Petitioners already produced the documents sufficient for both courts to make this determination to DOL. DOL undermines its position by this error of omission.

In Section 2(a) of its brief, DOL offers as fact that "Petitioner and his law firm control the Delaware Valley and Regional Employers' Association. Petitioner PennMont Benefit Services, Inc. ('PennMont') is a corporate affiliate of Koresko & Associates..." Nothing on the record supports this. Mr. Koresko and Koresko & Associates never controlled DVL or REAL VEBA. DVL no longer exists. The Trustee of REAL VEBA is Community Trust Company ("CTC") of Camp Hill, Pennsylvania. Whereas PennMont is the plan administrator, neither trust law nor the plan/trust documents remove CTC from ultimate control. This Court must ignore unsupported new "evidence" intended to overstate and mischaracterize Petitioners' roles.

There is ample record below that Mr. Koresko and his law firm are counsel to PennMont. PennMont is not a corporate affiliate of the law firm. This unsubstantiated mischaracterization muddles the significant issues before this Court. Pri-

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[1] *See* Slip Opinion of Judge Bassler in *Sidney Charles Markets v PennMont*, et al, U.S.D.C., DNJ, No. 00-2134, appearing at page 1372 of the Reproduced Record in the Third Circuit. *See also* Slip Opinion of Judge Hutton in *PennMont Benefit Services v. Sidney Charles Markets*, U.S.D.C., ED Pa., No. 01-4693, appearing at pg. 1347 of the Reproduced Record in the Third Circuit.

vacy laws, including the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, *et seq.*, (GLB) have modified ERISA §504. Moreover, ERISA § 504 only allows DOL to subpoena that information which "is reportable to the Secretary." By DOL regulation, participant names and medical records are not reportable. DOL simply does not want this case of first impression to result in judicial scrutiny of the limitations of its investigative jurisdiction and powers under ERISA § 504.

ARGUMENT

1. Review By This Court is Necessary To Reconcile Precedents With Subsequent Legislation and The Right To Privacy.

DOL takes the position that no further review is required as its broad subpoena power under ERISA §504, 29 U.S.C. §1134 is well established, citing, *inter alia*, *United States v Powell*, 379 U.S. 48 (1964) and *Walling, supra*. Absent is any substantive discussion of the clear Congressional intent evident in the GLB and the Right to Financial Privacy Act, 12 U.S.C. §3401, *et seq.*, (RFPA). Dogged embrace of outdated caselaw cannot overcome the Congressional directive that GLB and RFPA guard citizens from invasion of their financial privacy. DOL is incorrect to fear that review of this matter will impair its investigative powers. Petitioners merely seek acknowledgement of existing law and acceptance of the common sense approach of the Seventh Circuit, decided 10 years before GLB. *Reich v Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993) (DOL must demonstrate jurisdiction before its subpoenae will be enforced). Complying with subpoenae is expensive, said that Court. The duty of citizens to comply with DOL demands should be clear and reflective of modern legal developments. As set forth in our Petition for *Certiorari*, more recent decisions and intervening statutes have created juris-

dictional hurdles which DOL must surmount before it may invade constitutionally protected privacy rights.[2]

DOL posits that it can investigate "merely on suspicion that the law is being violated or even just because it wants assurance that it is not." *Powell, supra.*, at 57. Even under this reading, DOL's exercise of power was unwarranted. *Counsel for DOL stated on the record that DOL had no reason to believe that Petitioners had engaged in any wrongdoing.*[3] Using the minimal "mere suspicion" standard, DOL's purported investigation under ERISA §504 was flawed. Moreover, *Powell* was a tax case and its authority here may be questioned given the independent nature of IRS' statutory authority and operating procedures. Most importantly, DOL omits discussion of the fourth *Powell* requirement: a showing of legitimate purpose for use of an administrative subpoena – in other words, good faith. Absent "mere suspicion", DOL had no legitimate purpose to the inquiry below. DOL compounded its error by demanding confidential medical and financial records of plan participants to which Congress specifically granted protection except under limited circumstances not present here.

One must also question whether *Walling, supra.*, supports DOL's quest for unfettered subpoena power. In *Walling*, this Court examined the subpoena powers of the Wage and Hour

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[2] The Ninth Circuit found in *Donovan v National Bank of Alaska*, 696 F2d 678 (9th Cir. 1983) (DOL subpoena could be enforced only to the extent documents could establish jurisdiction; personal information was not subject to disclosure prior to establishing jurisdiction). Petitioners contend that RFPA and GLB impose upon DOL a duty to establish its right to obtain personal information.

[3] Record of the Third Circuit Court of Appeals, Case No. 04-3614 at Appendix p. 1385-Transcript of Hearing May 10, 2004, p. 19.

Administrator under the Fair Labor Standards Act of 1938. There was no actual search and seizure, as no one entered petitioner's premises to examine documents without consent. Critical to the Court's analysis was petitioner's asserted immunity from the Act's provisions, as compared to a legitimate contest to an overreaching search. *Id.*, at 499.

Unlike *Walling*, the DOL attempted to enter Petitioners' premises to examine and/or seize records. Further, there is no claim here that DOL does not have the right to examine some records [i.e., those specifically permitted by ERISA § 504]. Rather DOL must comply with the current federal statutes protecting privacy rights, and it must only request documents with information otherwise reportable to the Secretary. In fully insured arrangements like those at bar, nothing is reportable under the Secretary's own regulations. Moreover, under those regulations, even if a plan itself is reportable, client names and medical information are not.

DOL further attempts to cause misconception by alleging that Petitioners were sued for "ERISA violations." (Respondent's Brief, p. 7). This is not completely accurate. The cases are *Sidney Charles Markets, supra.*, (New Jersey case) and *PennMont Benefit Services, supra.*, (Pennsylvania case).

On July 21, 2006 summary judgment was granted in favor of PennMont in the Pennsylvania case. PennMont sought declaratory judgment as to whether its disposition of plan assets was permissible under the plan documents. Despite PennMont's efforts to fulfill its administrative duties, the employer refused to follow basic plan procedures and instead sued – first in New Jersey and then in Pennsylvania. The employer discovered that a deceased employee had embezzled over one million dollars. It wanted to seize an insurance payment made to the plan Trustee in derogation of the interests of other plan beneficiaries. Judge Sanchez opined that

the plan documents permitted PennMont to exercise its discretion in the absence of cooperation and/or instruction from the plan participants.[4] The District Court dismissed all claims, thus vindicating the very parties under attack here by DOL.

The state common law claims filed by Sidney Charles Markets in the New Jersey case were identical to the counter-claims dismissed in Pennsylvania. Judge Bassler dismissed the New Jersey case for lack of standing and failure to exhaust administrative remedies. The Judge held that all claims and enforcement of rights were pre-empted under ERISA. There were no ERISA violations. These two cases illustrate that a plan may have ERISA elements. However, in the present case, DOL did not subpoena records of an individual employer's plan. It subpoenaed unincorporated employer associations DVL and REAL for the names, financial data and medical records of private persons participating in non-ERISA multiple-employer plans/trusts.

Respondent rejects Petitioners' reading of *Reich v Great Lakes Indian Fish & Wildlife Commission*, 4 F3d 490 (7th Cir. 1993) and denies that regulatory jurisdiction should be addressed at the subpoena enforcement stage. Respondent cites to *EEOC v Sidley Austin Brown & Wood*, 315 F3d 696 (7th Cir. 2002) for the proposition that if the jurisdictional question is not an independent question, an agency can obtain enforcement of a subpoena without establishing jurisdiction (Respondent's Brief p. 7). Judge Easterbrook makes very clear that this age discrimination case does not modify the jurisdiction considerations as to government agency subpoenae found in *Reich:*

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[4] *See* Opinion of Hon. Juan R. Sanchez in *PennMont Benefit Services, Inc., supra.*, filed July 21, 2006.

"The Commission is entitled to the information that it thinks it needs in order to be able to formulate its theory of coverage before the court is asked to choose between the Commission's theory and that of the subpoenaed firm. Only if, as in *Reich* (citation omitted), the information that the subpoenaed firm resists furnishing is not even arguably relevant, because it is evident at the outset that whether the agency has any business conducting the investigation depends on a pure issue of statutory interpretation, can the court resolve the issue then and there without insisting on further compliance with the subpoena. (Citations omitted.) The issue in *Great Lakes* was whether the Fair Labor Standards Act applies to game wardens on Indian reservations. If, as we held, it did not, the continued investigation of the wardens' employer was all burden and no benefit, making insistence on compliance with the Labor Department's subpoena unreasonable. (Citation omitted)

Great Lakes does not hold, as Sidley argues, that characterizing a threshold issue as "jurisdictional" takes a case out of the general rule that enforcement of a subpoena cannot be resisted on the ground that the information the agency is seeking would not justify an enforcement action (citations omitted)...[t]he cases leave intact the principle that a subpoena may be challenged as unreasonable. And one basis on which it may be found unreasonable is that, as in *Great Lakes*, the agency clearly is ranging far beyond the boundaries of its statutory authority."

Sidley, 315 F.3d 696 at 700-701.

Sidley leaves intact the proposition that the DOL cannot exceed its statutory authority. Clarification of that statutory authority is at the heart of this case; i.e., whether ERISA §504 was modified by the GLB, RFPA, and HIPAA Regulations, 29 C.F.R. §2520.104-21, *et seq.* (HIPAA), and whether the plain statutory language conflicted with the information requested below. DOL diverts this Court from its purpose by flatly stating no further review is required.

2. The Issues Raised In The Petition For Certiorari Are Properly Before This Court.

DOL incorrectly states that GLB and other privacy statutes were not raised below. The record shows that the issues are properly before this Court.

Whereas Petitioners raised privacy issues generally from the outset of the case, Petitioners specifically cited GLB to the District Court on July 9, 2004 in the privilege log memorandum to Judge McLaughlin, who elected not to address it.[5] The issue was before the Court of Appeals and was fully treated by CTC in its *amicus curiae* brief.[6] It was addressed in Petitioners' Reply Brief and subsequent request to the Court of Appeals for Panel and *En Banc* rehearing.[7] The fact that the Court of Appeals never reached the issue in that procedural posture does not preclude its consideration here. Petitioners also filed a petition for writ of mandamus with the Third Circuit, asking for an order compelling the District

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[5] Record of the Third Circuit Court of Appeals, Case No. 04-3614 at Appendix p. 747a.

[6] *Id.*, Brief filed 2/7/05.

[7] Record of the Third Circuit Court of Appeals Case No. 04-3616, Motion filed 10/26/02 and amended Motion on 11/2/05.

Court to comply with GLB and RFPA.[8] That petition was denied, and is one of the orders appealed herein.

Respondent contends that even if the issue is properly before the Court, Petitioners' argument is without merit because Petitioners are not "financial institutions" bound by GLB. DOL quotes the definition at 12 U.S.C. §3401(1) and concludes PennMont does not fit into any specified category. This is simply nonsensical. PennMont administers funds held in trust for VEBA participants. While PennMont may not fit neatly into a particular category, it is clearly an "institution engaged in the business of providing financial services to customers" who maintain a "financial account" or other "relationship with the institution". (*See* 12 U.S.C. §3401(1)). Respondent's attempt to relieve PennMont of its obligations under the federal privacy statutes is as illogical as it is incorrect. DOL asked for "bank statements" and "accounting records" in its subpoenae, but now says no financial accounts are involved? While DOL cites to its subpoena authority under the FTC Act, (Respondent's Brief, p.10), it fails to adhere to the FTC's interpretation of GLB. FTC regulations treat lawyers and plan administrators who deal with clients' money as "financial institutions." 12 CFR §225.28

Petitioners find it telling that Respondent would even suggest that HIPAA does not impose any duty of non-disclosure on Petitioners because they are neither health care providers nor a health care clearinghouse electronically transmitting information. Life insurance applications processed by PennMont on paper and by Internet online contain the full medical and mental health history of thousands of plan participants. HIPAA's prohibition against disclosure of private

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[8] Third Circuit Court of Appeals, No. 05-1440, 05-1946, 05-2673, 04-3614.

medical information is well known. DOL's position regarding HIPAA demonstrates contempt for Congressional intent and that DOL is intractable in resisting statutory modification or much-needed judicial review of the limits on its subpoena power.

CONCLUSION

Space limitations prevent comment on Respondent's remaining arguments. Petitioners in response to those matters incorporate the discussion contained in the original Petition.

For all of the foregoing reasons and those contained in the original Petition, it is respectfully requested that this Honorable Court issue a writ of certiorari to the Third Circuit Court of Appeals, summarily reverse the actions of the court below and/or grant any and all appropriate relief consistent with the issuance of the writ.

Respectfully submitted,

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